Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

TOM C. CLARK, Justice, JOHN S. HASTINGS, Circuit Judge, JOHN PAUL STEVENS, Circuit Judge, FRANK J. McGARR, District Judge, and FRANCIS MUSCARE,

Respondents.

REPLY BRIEF OF PETITIONER

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Concerning the Statement of the Case

1. Respondent Muscare's statement of the case presents his suspension without its background. By dramatizing only the last act, with no exposition of how the protagonist got in his predicament, he endeavors to make it seem as though his superior officers suddenly, without warning, descended upon him and, without explanation, abruptly and arbitrarily threw him out of the fire station.

Actually Muscare's deficiencies as an employee had a history of some three years. According to his own testimony, he had violated the departmental safety regulation concerning facial hair and had twice acknowledged the purport and force of that regulation by grudgingly complying with it, only to violate it again. His contemptuous defiance of the regulation and of the orders of his superiors was open and unmistakable.

2. The brief in opposition (p. 3) filed in Muscare's behalf to the contrary notwithstanding, he presented no evidence in support of his challenge to the departmental grooming regulation beyond his own bare, unproven assertion that he could get a good seal on his gas mask while wearing a beard.

3. Petitioner does not deny that respondent Muscare duly raised the issue of due process in his complaint. But at the hearing on March 19, 1974, the only evidentiary hearing had in the case, that on Muscare's application for a preliminary injunction, Muscare made no attempt to prove that he had been "cut off from his job" without notice, without an opportunity to be heard in his own defense. In fact, Muscare's brief testimony established precisely the contrary.

It was in his "motion to consider previous ruling," presented 10 days later on March 29, 1974, that his counsel, by way of afterthought, did request the court "to rule on the remaining constitutional challenges" (Brief in Opposition, p. A2). The district court ruled that it deemed itself to have "considered them" since they were "in a sense . . . in your brief" and therefore "the denial of the petition for a preliminary injunction is deemed to be a ruling on all the challenges you raised" (*id.*, p. 3).

4. Muscare's argument, tucked away in his statement of the case (Brief in Opposition, p. 4), to the effect that "[i]n thus rejecting Petitioner's contention that the procedures already available under Illinois law satisfied the requirements of due process, the Court of Appeals was not called upon and did not pass on the constitutionality of that law itself" is based on a distinction without a difference. In Justice Holmes' phrase, "it will not wash".

ARGUMENT

I.

IF RESPONDENT MUSCARE'S DUE PROCESS CLAIM, ATTACKING THE STATE STATUTORY PROCEDURE OF STATEWIDE APPLICATION, PURSUANT TO WHICH HE WAS SUSPENDED, WAS SUBSTANTIAL, ITS RESOLUTION REQUIRED THE CONVENING OF A THREE-JUDGE DISTRICT COURT.

Muscare's brief in opposition (pp. 4,5) is inaccurate in stating that the petitioner has represented and conceded that a three-judge district court was not required at the time of the hearing on Muscare's application for an injunction. Our petition said no more than "it is possible" this was so. It would be so only if the respondent had abandoned his due process contentions. He had apparently done just that at that point, since due process was not mentioned by respondent at the contested hearing on his application for an injunction, the only trial that was had in this case.

The relief sought in the complaint required the summoning of a three-judge district court. However, countless claims are alleged in complaints that are forgotten and abandoned at trial. A three-judge court need not be convened in order to dispose of insubstantial constitutional claims. *Ex parte Poresky,* 290 U.S. 30 (1934); *Bailey* v. *Patterson,* 369 U.S. 31, 7 L.Ed. 2d 512 (1962). As Judge Friendly remarked in *Utica Mutual Insurance Co.* v. *Vincent,* 375 F. 2d 129, at 131 (2 Cir., 1957), "Congress could not have intended to require three judges to be assembled when decisions could not possibly go in any manner save one." From the summary manner in which District Judge McGarr disposed of Muscare's due process claims, which Muscare had lamely attempted to reassert in his "motion to reconsider" (Brief in Opposition, pp. A1-A3), it is plain that the judge considered the due process claims insubstantial.

But if the due process claims were substantial, a three-judge court was required. A suspension of a civil service employee, effected pursuant to a state statute of statewide application, cannot be enjoined on the ground that the statutory procedure violates the federal constitution, except by a three-judge district court. A constitutional claim that prevails is necessarily substantial. The court of appeals exceeded its jurisdiction in undertaking to perform what could be done only by a three-judge district court, from which appeal to this Court lies of right. When the court of appeals perceived that it disagreed with the single district judge as to the substantiality of the constitutional claims, it should have returned the case to the district court with an appropriate direction to convene a three-judge panel.

Respondent's reliance (Brief in Opposition, pp. 7,8) on *Dusch* v. *Davis,* 378 U.S. 112, 18 L.Ed. 2d 656 (1967), and *McCrimmon* v. *Daley,* 418 F. 2d 366 (7 Cir., 1969), in arguing that the injunction herein is of only local import, is misplaced.

In *McCrimmon* the legislation challenged was a municipal ordinance restricting the employment of women as bartenders. The state statute involved was merely enabling legislation empowering municipalities to adopt such enactments.

Similarly, in *Dusch* v. *Davis,* 387 U.S. 112, 18 L. Ed. 2d 656 (1967), the legislation, there challenged under the "one-person, one-vote" rule, was merely a consolidation plan adopted by one city—Virginia Beach, Virginia—and one county—Princess Anne County, Virginia—to form a city under a borough type of government. The only state statutes involved were mere enabling legislation, which in no way contravened the "one-person, one-vote" principle, and a city charter amendment, which, although enacted by the state legislature, was of local import only.

In the instant case, on the contrary, the state statute involved is not a measure merely authorizing enactment of local legislation, if the individual municipality so chooses. Here the state statute is a statewide civil service law expressly directing and commanding all municipalities in the State of Illinois to follow certain procedures in suspending certified civil service employees. The statute in question—Illinois Rev. Stat. 1973, ch. 24, par. 10-1-18—affirmatively provides:

> "Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged or sus-

> pended for more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. . . . Nothing in this Division limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days, except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

That is not mere enabling legislation.

It is noteworthy that in *Goss* v. *Lopez,* ..... U.S. ....., 42 L. Ed. 2d 725 (1975), the case upon which the Seventh Circuit and respondent Muscare have principally relied, a three-judge district court was convened, as was noted, without disapproval, by this Court (42 L. Ed. 2d at 731, fn. 3), on the ground that, as here, "the complaint sought to restrain the 'enforcement' and 'operation' of a state statute by restraining the action of any officer of such state [in *Goss,* city high school principals] in the enforcement or execution of such statute." This Court found the Ohio "statute unconstitutional insofar as it permits such suspensions without notice or hearing" (42 L. Ed. 2d at 740).

Muscare was suspended pursuant to state statute for a period of 29 days. Under the statute, he had a right to a hearing before the civil service commission on the propriety of the suspension. He failed to exercise that right.

The court of appeals concluded that this procedure denied Muscare due process under the federal constitution and held that the district court erred in denying him an injunction against his being suspended pursuant to this statutory procedure.

This is a decision which vitally affects the employment situation of many thousands of civil service employees in Illinois and which must materially influence the conduct of management-employee relations in public affairs in that state. Such a decision lies wholly within the jurisdiction of a three-judge district court. The judgment of the Court of Appeals is void.

II.

THE COURT OF APPEALS HAS MISCONSTRUED THE MAJORITY OPINION OF THIS COURT IN GOSS v. LOPEZ.

Respondent Muscare and petitioner are in evident agreement that the Seventh Circuit's interpretation of this Court's opinion in *Goss* v. *Lopez,* ..... U.S. ....., 42 L.Ed. 2d 725 (1975), was determinative of the result reached below in the matter at hand. But the statement of Muscare's counsel (Brief in Opposition, p. 11) that petitioner is "misrepresenting this Court's opinion in *Goss*" is unwarranted.

The complaint filed by the plaintiff students in *Goss* alleged (42 L. Ed. 2d 730) that they had been denied due process because they had been suspended "without a hearing either prior to suspension or within a reasonable time thereafter." The students, who had been suspended because of their allegedly disruptive misconduct on school premises (42 L.Ed. 2d at 732), did not demand a presuspension hearing.

It is true, the majority opinion of Mr. Justice White in *Goss* does state (42 L.Ed. 2d at 739) that "as a general rule notice and hearing should precede removal of the student from school." But these words were uttered in the context of the school situation, where, as Mr. Justice White stated, "[i]n the great majority of cases the disciplinarian may informally discuss the alleged misconduct

with the students minutes after it has occurred" (42 L.Ed. 2d at 739). The civil service scene, at least in large cities, is not the same. Muscare's suspension did not become effective until it had been reviewed and authorized by the Fire Commissioner (R. 17, p. 112).

In *Goss* the majority opinion also declared (42 L.Ed. 2d at 740):

> "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial type procedures might well overwhelm administrative facilities in many places. . . . Moreoveor, further formalizing the suspension process and escalating its formality and adversary nature may . . . make it too costly as a regular disciplinary tool. . . ."

Muscare is conveniently silent as to whether or not he contends he is entitled to a trial-type presuspension hearing as a matter of constitutional imperative, or whether he admits due process would be satisfied if he were afforded the informal opportunity to state his case, opportunity of the type authorized by the majority opinion of this Court in *Goss*.

To keep to the facts of the case at bar, Muscare had ample opportunity to set forth his point of view as to the licity of the department facial hair rule. As he himself testified, he had, over a period of three years, twice before grown a beard, been reprimanded, had his say, been overruled, been ordered to shave and at length had complied.

Knowing all this, he again let his facial hair grow in direct defiance of his superior's orders (R. 17, pp. 97,98). All this occurred prior to his suspension.

Even if Muscare were correct in his reading of *Goss*, his every right to a presuspension hearing under his interpretation of that case, was in fact satisfied.

But we do not concede that the majority opinion of the Court in *Goss* makes a presuspension hearing constitutionally imperative. The statement of the Court that "as a general rule, notice and hearing should precede removal of the student from the school", we maintain, means that, as a matter of policy, it is more desirable that the hearing, if feasible or even if possible, precede disciplinary action. Of course, from the employee's point of view, though probably not from the employer's, it is more desirable, if it can be arranged. But that does not make it a constitutional requirement.

III.

THE SEVENTH CIRCUIT HAS MISREAD ARNETT v. KENNEDY ALSO.

The Brief in Opposition (p. 11) takes the position that the decision of the Seventh Circuit is confirmed by this Court's disposition of *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). The Seventh Circuit in fact so stated (Petition, pp. 11a, 12a).

It is true, as the Brief in Opposition (p. 11) remarks, the federal employee in *Arnett* (which concerned not a suspension, but a dismissal) was by statute afforded pre-suspension administrative procedures, including 30 days prior notice, access to the derogatory material against him, and the right to respond both orally and in writing. But the

employee contended due process required a trial-type hearing, including right to counsel and to present witnesses in his behalf, together with the right to cross-examine adverse witnesses. The majority of this Court disagreed and held that a trial-type hearing was not required. In doing so, it reversed a three-judge district court in the northern district of Illinois, sitting in the jurisdiction of the Seventh Circuit.

In the case at bar, the Seventh Circuit believed that the two concurring justices in *Arnett*—Mr. Justice Powell and Mr. Justice Blackmun—"concurred in the result *solely* because they believed that the statute's provision of notice and opportunity to be heard *prior* to discharge satisfied the minimal requirements of constitutional due process" (Petition, pp. 11a, 12a; emphasis supplied). But Mr. Justice Powell's concurring opinion in *Arnett,* in addition to the language we have already cited in our petition (p. 27), concerning the need of the government to act expeditiously in removing an unsatisfactory employee, contains the following statement in footnote 4 (40 L. Ed. 2d at 41, 42):

> "[T]he fact that some federal agencies may have decided to hold evidentiary hearings cannot mean that such a procedure is constitutionally mandated. The Federal Government's general practice to the contrary argues that efficiency is in fact thought to be adversely affected by prior evidentiary hearings."

The concurring opinion also considered due process not to require an impartial pre-removal hearing officer, for the reason that "an important decision-maker is provided at the post-removal hearing where the employee's claims are finally resolved" (40 L.Ed. 2d at 42, fn. 5).

Under *Arnett,* advance notice and the right of the employee to make an informal written presentation do satisfy

due process, but they are not constitutionally required. We submit that a careful reading of the several opinions in *Arnett* supports this interpretation.

In any event, respondent Muscare had *de facto* at least as much notice and opportunity to state his case as the employee in *Arnett* v. *Kennedy* did.

Muscare had twice before been ordered to bring himself into conformity with the departmental regulation of facial hair and he had twice complied by shaving. The third time he stated his opinion concerning the rule at the Fire Academy and deliberately refused to comply.

The language in *Board of Regents* v. *Roth,* 408 U.S. 511, at 569, 570 (1972), that is quoted in the Brief in Opposition (p. 13), to the effect that "when protected interests are implicated, the right to some kind of prior hearing is paramount", was not necessary to this Court's decision in that case, which reversed the Seventh Circuit and held that a non-tenured faculty member in a state college has no protected interest in his employment beyond the period of his contract and is not entitled to due process concerning his non-retention. It was therefore *obiter dicta.* Nor is there a parallel between *Roth* and the instant matter, since Roth was given no reason whatsoever for his non-retention, whereas Muscare knew full well why he was being suspended. The very complaint Muscare filed in this case shows that he understood he had been disciplined because of his long-standing violation of the departmental regulation concerning facial hair and his defiance of his superiors' orders to shave off his beard.

As for *Perry* v. *Sinderman,* 408 U.S. 593 (1972), cited in the Brief in Opposition (pp. 13, 14), we are unable to agree that it stands for the proposition that a "pretermina-

tion hearing [is] required". The issue to which the Court addressed itself there was whether a nontenured junior college teacher had acquired *de facto* tenure and therefore was entitled to due process with respect to his non-retention. The Court remanded the case to the district court for a hearing on "the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution'." It was noted by this Court that proof of such interest would not entitle Sinderman to reinstatement, "[b]ut such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his non-retention and challenge their sufficiency" (at 603). Thus the hearing envisioned by *Perry* v. *Sinderman* is similar to the post-suspension hearing, at the request of the employee, authorized by the Illinois civil service statute (Ill. Rev. Stat. 1969, ch. 24, par. 10-1-18) and endorsed and mandated by the Illinois Supreme Court in *Kropel* v. *Conlisk*, 60 Ill. 2d 17 (1975).

IV.

A CONFLICT DOES EXIST BETWEEN THE ILLINOIS SUPREME COURT AND THE SEVENTH CIRCUIT ON THE CONSTITUTIONAL ISSUE PRESENTED BY THIS CASE.

The assertion is made in the Brief in Opposition (p. 17) that no conflict exists here between the Illinois Supreme Court and the Seventh Circuit, since the Chicago authorities can conform to the Seventh Circuit's ruling by granting presuspension hearings in all cases, without vitiating the Illinois Supreme Court's ruling that in cases of suspensions of 30 days or less, a postsuspension hearing satisfies due process. This theory is both amazing and amusing. Respondent Muscare thus argues that no conflict, justifying

this Court's intervention, will exist if the City will obligingly ignore its rights as they have been determined by the highest court of its state.

It is with a rule of law that we are here concerned. The Illinois Supreme Court holds that due process does not require a presuspension hearing, while the Seventh Circuit holds that due process requires a presuspension hearing. The question, of obvious importance, is, Who is right? The answer to that question can be given only by this Court.

In *Kropel* the Illinois Supreme Court authoritatively reviewed the history of the state civil service statutory provisions relating to employee suspensions. In that case, it is true, it was directly concerned with Illinois Rev. Stat., ch. 24, par. 10-1-18.1, which has to do solely with police officers in municipalities of 500,000 population or more (i.e. Chicago), whereas the general statewide civil service provision (Illinois Rev. Stat., ch. 24, par. 10-1-18) grants all civil service employees of Illinois municipalities, with the exception of Chicago police officers, suspended for 30 days or less, but more than one week, or twice or more within six months, the right to a postsuspension hearing, upon request, with the right to back pay, if vindicated. Par. 10-1-18.1 permitted Chicago police officers to be suspended for any period of 30 days or less without a hearing.

The Illinois Supreme Court ruled that par. 10-1-18, the general civil service provision, established a statewide policy of granting all civil service employees of municipalities, including Chicago police officers, if suspended for any period whatsoever of 30 days or less, the right, upon request, to a postsuspension hearing, with the right to recover backpay if vindicated.

In thus liberally construing these state statutes, the Illinois Supreme Court was exercising its constitutional power

as the final interpreter of Illinois law, and it did so expressly in order to safeguard the validity of the legislation in the light of both the state and federal constitutions (60 Ill. 2d at 19, 26).

Common sense suggests that most civil service suspensions are for 30 days or less—most commonly, for but a few days or even only one day. Common sense also suggests that most such suspensions are justified and that if mistakes occur, they will usually be righted by informal means. Usually, indeed, the employees does not contest the fairness of the discipline and accepts the penalty without a hearing. Requiring the municipality affirmatively to establish the correctness of every invocation of managerial authority before meting out any suspension, no matter how brief, would place a burden on the municipality that in most cases would be completely unnecessary and disruptive of governmental efficiency.

V.

THIS COURT HAS JURISDICTION TO DETERMINE THE VALIDITY OF THE CHICAGO FIRE DEPARTMENT RULE LIMITING THE AMOUNT OF FACIAL HAIR THAT MAY BE WORN BY ITS FIREFIGHTERS.

We are also unable to agree with respondent Muscare's "heads-I-win-tails-you-lose" argument (Brief in Opposition, pp. 20,21) that this Court is without jurisdiction to determine the validity of the Chicago Fire Department's rule limiting the amount of facial hair a uniformed firefighter may wear.

Of course, if the Court issues a writ of mandamus, the judgment of the single-judge district court will be voided, including its upholding of the rule as valid, and the constitutionality of the facial hair regulation will have to be adjudicated over again before a three-judge district court, if Muscare continues to press his case.

If, however, the Court denies mandamus, but grants certiorari and reverses the court of appeals, that will reinstate the judgment of the single-judge district court, which has been set aside by the court of appeals. The failure of the court of appeals to rule on the constitutionality of the regulation resulted from that court's erroneous view of the requirements of due process and its own deliberate choice. However, the court of appeals did intimate considerable sympathy for Muscare's point of view on this issue (Petition, pp. 62-82), although that contention is contrary to the weight of authority, as is indicated by the Seventh Circuit's own opinion (Petition, p. 7a, fn. 2). The petitioner has duly raised the issue in his statement of the questions presented by this petition, and, we submit, this Court can properly consider and rule on the issue. Rule 40 (1) (d) (2) of the Rules of this Court.

In the event this Court grants certiorari, but affirms the court of appeals, the holding of the single-judge district court that the rule does not infringe Muscare's constitutional rights will still stand, absent a reversal of that holding by this Court, unless this Court remands the case to the court of appeals with directions to pass on the issue, and that tribunal then holds the rule invalid, and this Court then either denies certiorari or grants it and upholds invalidation of the rule.

If this Court affirms the court of appeals on the due process issue without reaching the question of the validity of the rule, it would seem that the probable result would be for Muscare to be awarded back pay for the period of his suspension. But that would not prevent the department

from instituting new presuspension disciplinary proceedings against Muscare for his patent infractions of department rules, and it would seem to be its duty to do so.

The discussion of this point in the Brief in Opposition is inconsistent. On the one hand, it states baldly (p. 20) that "[t]his court is without jurisdiction to determine the validity of the fire department's hair rule". Yet, on the other hand, the Brief in Opposition argues (p. 21) that if this Court reverses the Seventh Circuit on due process issues, this Court then has jurisdiction to affirm the result reached by the court of appeals "on the alternative grounds that Lt. Muscare was subject to other violations of his constitutional rights" that is, suspension for violation of a rule alleged to be unconstitutional.

If this Court has jurisdiction to hold the departmental rule invalid, as respondent Muscare maintains and admits, then it has jurisdiction to hold it valid.

CONCLUSION

The writ of mandamus should issue.

In the alternative, a writ of certiorari should issue, the judgment and opinion of the Court of Appeals for the Seventh Circuit should be reversed, and the judgment of the District Court for the Northern District of Illinois should be affirmed.

Respectfully submitted,

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